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Lee Boon Kwang v Public Prosecutor

B COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO B-05–20–01 OF 2012
LINTON ALBERT, DAVID WONG AND ZAKARIA SAM JJCA
9 OCTOBER 2014

C *Criminal Law — Dangerous Drugs — s 39B(1)(a) — Trafficking in 3,984.4g of 3,4-Mathylenedioxymethamphetamine — Appellant convicted for trafficking and sentenced to death — Appeal against — Dangerous drugs found inside bag tag with 'Lee' at airport — Denial of knowledge of drugs — Whether knowledge of drugs established — Defence of innocent carrier — Whether trial judge appreciated defence case sufficiently — Whether conviction for trafficking safe — Whether appellate interference warranted — Dangerous Drugs Act 1952 s 39B(1)*

D

E The appellant was charged for trafficking in 3,984.4g of 3, 4-mathylenedioxymethamphetamine ('MDMA') at Kuala Lumpur International Airport. At the end of the prosecution's case, the trial judge amended the charge to one of possession wherein the appellant pleaded guilty and was convicted and sentenced to 14 years and ten strokes of *rotan*. The F prosecution's appeal to the Court of Appeal was allowed and the appellant was ordered to enter defence on the original charge of trafficking. At the end of the defence case, the appellant was found guilty and was convicted for trafficking and sentenced to death. The appellant's defence in essence was that he had no knowledge that the drugs were concealed in the bag which carried a bag tag G with the name 'Lee'. Further, the appellant alleged that the said bag did not belong to him but to one Phang Hin Cheong ('Phang'). It was the appellant's version that he had travelled to Paris together with Phang and Tiang Wei Jun ('Tiang') and when he returned, Phang had handed the said bag to him to be brought back to Malaysia. Both Phang and Tiang were charged in court for H trafficking in MDMA, the same kind of drugs that the appellant was also charged with. Before this court, the appellant contended that the trial judge failed to appreciate the defence case namely: (i) that Phang was a real person; (ii) that the failure of the prosecution to call Phang to rebut the appellant's version was fatal; (iii) that the prosecution never offered Phang and Tiang to I the defence; and (iv) that there was nothing incredible about the appellant's version.

Held, dismissing the appeal, affirming the conviction and sentence:

(1) The appellant had given two conflicting versions as to how the bag containing the drugs got into his possession. At the prosecution stage, the defence had suggested that Tiang was the one who handed the said bag to him. However, at the defence stage, the appellant changed his line of defence, where he said that it was Phang who asked him to carry the said bag to Malaysia. These conflicting versions make his defence very doubtful or a recent invention by him (see para 12).

(2) The appellant also failed to explain why he waited until his defence was called to reveal the crucial evidence to his defence, that the said bag belonged to Phang and Phang asked him to carry it to Malaysia. This is not a conduct of an innocent person. Further, the late disclosure of the names and roles of Phang and Tiang until his defence was called, make it too late for the police to check the veracity of the appellant's version of the facts and to produce these witnesses (see paras 14 & 16).

[Bahasa Malaysia summary

Perayu dituduh mengedar dadah 3, 4-Mathylenedioxymethamphetamine ('MDMA') sebanyak 3,984.4g di Lapangan Terbang Kuala Lumpur. Pada akhir kes pihak pendakwaan, hakim perbicaraan meminda tuduhan kepada satu milikan di mana perayu memplid bersalah dan disabitkan dan dihukum 14 tahun dan sepuluh sebatan rotan. Rayuan pihak pendakwaan ke Mahkamah Rayuan dibenarkan dan perayu diperintahkan untuk memasuki pembelaan atas tuduhan asal pengedaran. Pada akhir kes pembelaan, perayu didapati bersalah dan disabitkan untuk pengedaran dan dijatuhkan hukuman mati. Pembelaan perayu pada asasnya adalah bahawa dia tidak mempunyai pengetahuan bahawa dadah disembunyikan di dalam beg yang membawa tag beg dengan nama 'Lee'. Selanjutnya, perayu mendakwa bahawa beg tersebut bukan milikannya tetapi seorang yang bernama Phang Hin Cheong ('Phang'). Ia adalah versi perayu bahawa dia telah ke Paris bersama Phang dan Tiang Wei Jun ('Tiang') dan apabila dia pulang, Phang telah menyerahkan beg tersebut kepadanya untuk dibawa balik ke Malaysia. Kedua-dua Phang dan Tiang dituduh di mahkamah kerana mengedar MDMA, jenis dadah yang sama yang dituduh terhadap perayu. Di hadapan mahkamah ini, perayu berhujah bahawa hakim perbicaraan gagal untuk menilai kes pembelaan iaitu: (i) bahawa Phang adalah orang betul; (ii) bahawa kegagalan pihak pendakwaan untuk memanggil Phang untuk mematahkan versi perayu adalah fatal; (iii) bahawa pihak pendakwaan tidak pernah menawarkan Phang dan Tiang kepada pembelaan; dan (iv) bahawa tidak terdapat keluarbiasaan mengenai versi perayu.

Diputuskan, menolak rayuan, mengesahkan sabitan dan hukuman:

(1) Perayu telah memberikan dua versi bertentangan bagaimana beg yang mengandungi dadah tersebut berada dalam milikannya. Pada peringkat pihak pendakwaan, pembelaan telah mencadangkan bahawa Tiang orang

yang memberikan beg tersebut kepadanya. Walau bagaimanapun, pada peringkat pembelaan, perayu menukar pembelaannya, di mana dia menyatakan bahawa Phang yang meminta dia membawa beg tersebut ke Malaysia. Versi bertentangan ini membuatkan pembelaannya tersangat meragukan atau rekaan baru olehnya (lihat perenggan 12).

(2) Perayu juga gagal untuk menjelaskan mengapa dia menunggu sehingga pembelaannya dipanggil untuk memberitahu keterangan penting kepada pembelaannya, bahawa beg tersebut dimiliki oleh Phang dan Phang telah meminta dia membawanya ke Malaysia. Ini bukan tingkah laku seorang yang tidak bersalah. Selanjutnya, pendedahan lambat nama dan peranan Phang dan Tiang sehingga pembelaannya dipanggil, membuatkannya lambat untuk pihak polis memeriksa kebenaran versi perayu terhadap fakta dan untuk mengemukakan saksi-saksi ini (lihat perenggan 14 & 16).]

Notes

For cases on s 39B(1)(a) of the Dangerous Drugs Act 1952, see 4(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 400–608.

Cases referred to

Alcontara a/l Ambross Anthony [1996] 1 MLJ 209; [1966] 1 CLJ 705, PC (refd)

Teng Howe Seng v PP [2009] 3 MLJ 46, FC (refd)

Appeal from: Criminal Trial No 45A-86 of 2005 (High Court, Shah Alam)

Hisyam Teh Poh Teik (Teh Poh Teik & Co) for the appellant.

Yusairi Amer bin Abdul Kasim (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Zakaria Sam JCA (delivering judgment of the court):

BACKGROUND

[1] The appellant was tried for trafficking in 3,984.4g of 3, 4-mathylenedioxymethamphetamine ('MDMA') on 25 September 2004 at about 7.10am at Pejabat Narkotik, Lapangan Terbang Antarabangsa Kuala Lumpur.

[2] At the end of the prosecution's case the learned trial judge amended the charge to one of possession wherein the appellant pleaded guilty and was convicted and sentenced to 14 years and ten strokes of the *rotan*.

[3] Dissatisfied, the prosecution appealed to the Court of Appeal. The appeal was allowed on 11 August 2011 and the appellant was ordered to enter his defence on the original charge of trafficking.

[4] The appellant entered his defence and at the end of the defence case, the appellant was found guilty and was convicted for trafficking and sentenced to death.

THE PROSECUTION'S CASE

[5] Hence, this appeal by the appellant.

[6] Acting on information, 'SP9' (Amarsie a/l Kunjoo) and his men mounted an operation to check the appellant who would be arriving from Paris to KLIA on MH 21 on transit to Johor Bahru on MH 2508. SP3 led a team of nine other customs officers. They were divided into three different teams. SP3 and three other officers were stationed at the conveyor belt marked BC 05 together with a sniffer dog. The other officers were nearby. From the carousel the sniffer dog was able to sniff out a bag with the brand 'Word Wide Travel' which carried a bag tag with the name 'Lee'. The bag was locked and it was left on the conveyor belt. SP3 was informed by one of the airport staff that the bag would be sent to the transit conveyor in the Main Terminal Building MA40. The appellant meanwhile was being followed by other members of the arresting team from the arrival gate to the aerotrain areas. The appellant was said to be behaving nervously. The appellant was then stopped by the raiding team and was led to the baggage transit area where the said bag was.

[7] The appellant and the said bag were escorted to the Customs Office. At the Customs Office the said bag was unlocked by the appellant using the combination number 833. The said bag was searched and there was a concealed compartment at the bottom of the bag. There was a piece of cloth and beneath were carbon papers. The carbon papers were torn open and there were some red pills hidden. SP3 then administered the caution to the appellant. The appellant was said to be looking pale and shivering.

[8] The appellant was brought back to the Customs Narcotics Office at Nilai. A 100% search was done on the said bag and from the concealed compartment six plastic packets containing pills were recovered and upon chemical analysis they formed the subject matter of the charge.

DEFENCE OF THE APPELLANT

[9] In essence the defence of the appellant was that he had no knowledge that drugs were concealed in the said bag as the said bag did not belong to him

but to one Phang Hin Cheong ('Phang'). It was the appellant's version that he had travelled to Paris together with Phang and Tiang Wei Jun ('Tiang') and when he returned Phang had handed the said bag to him to be brought back to Malaysia.

[10] Before us, the appellant canvassed only one ground, that the learned trial judge failed to appreciate the defence case ie:

(a) that Phang is a real person;

(b) that the failure of the prosecution to call Phang to rebut the appellant's version is fatal;

(c) that the prosecution never offered Phang and Tiang to the defence; and

(d) that there was nothing incredible about the appellant's version.

THE FINDINGS

[11] It is the defence case that the actual trafficker was Phang. Phang is a real person. Both Phang and Tiang were charged in court for trafficking in MDMA, the same kind of drugs that the appellant was also charged with. On this issue, the learned trial judge had explained as follows (at pp 96–97 of the RA):

> Di dalam pembelaannya, tertuduh menafikan beliau mempunyai pemilikan fizikal dan pengetahuan ke atas beg tersebut dan juga tidak mengetahui tentang dadah yang disorok di dalam beg tersebut. Tertuduh juga menyatakan bahawa beliau adalah pembawa yang tidak bersalah.
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> Di dalam pembelaannya tertuduh menyatakan dia tidak pasti membawa beg tersebut, dia tidak membuka beg tersebut dengan kata laluan kunci kombinasi bernombor 833 dan beg tersebut dibuka sendiri oleh pegawai Kastam. Tertuduh juga menyatakan beg tersebut diserahkan oleh Phang Hin Cheong kepadanya. Pembelaan-pembelaan yang material ini tidak sekali-kali cuba dikemukakan semasa saksi-saksi pendakwaan dipanggil memberi keterangan (sila rujuk kes *Wong Swee Chin v Public Prosecutor* [1981] 1 MLJ 212, *Loh Liang Gun v Public Prosecutor* [2007] 5 MLJ 159 dan *Public Prosecutor v Abdul Rahman* [1982] 1 MLJ 346). Sebaliknya SP3, SP5 dan gambar P4(7) mengesahkan bahawa beg tersebut adalah beg yang dirampas dari tertuduh setelah beg tersebut dicamkan oleh tertuduh.
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> Tertuduh menyatakan beliau ada memberitahu pegawai Kastam bahawa beliau disuruh oleh Phang Hin Cheong untuk membawa beg tersebut. Semasa kes pendakwaan, peguam tertuduh mencadangkan bahawa beg tersebut bukan kepunyaan tertuduh tetapi beg tersebut adalah kepunyaan Tiang Wei Jun. Sebaliknya semasa kes pembelaan, tertuduh menyatakan bahawa beliau disuruh ole Phang Hin Cheong untuk membawa beg tersebut. Fakta-fakta iaitu pada tag bagasi (P13A) yang ada pada beg tersebut tertera nama tertuduh, slip tag bagasi atas nama tertuduh juga dilekatkan bersama tiket penerbangan tertuduh, tertuduh sendiri yang mengecam dan memberi kata laluan kunci kombinasi beg tersebut adalah

fakta-fakta yang tidak tercabar dan diterima oleh mahkamah. Fakta-fakta ini membawa kepada inferens yang munasabah bahawa beg tersebut adalah kepunyaan tertuduh.

Saya juga mendapati jika benar yang dikatakan oleh tertuduh bahawa beg tersebut adalah kepunyaan Phang Hin Cheong atau diberi oleh Phang Hin Cheong, paling tidak tertuduh akan mengemukakan percakapan beramaran yang diberikan oleh tertuduh selepas 8 jam tertuduh ditangkap untuk menyokong keterangannya. Tertuduh juga tidak memberitahu bahawa beliau ada memberitahu bahawa beg tersebut adalah kepunyaan Phang Hin Cheong kepada pegawai Kastam atau pegawai penyiasat. Tidak ada sebab yang kukuh untuk menerima pembelaan tertuduh bahawa Phang Hin Cheong mahu menyusahkan tertuduh hanya disebabkan beg tersebut pada masa yang singkat sebelum beliau bertolak meninggalkan hotel ke lapangan terbang Paris.

Saya mendapati dadah tersebut disimpan secara tersorok di dalam beg tersebut. Melalui pemeriksaan yang rapi sahaja pegawai Kastam berjaya menemui dadah yang disimpan secara tersorok itu. Pihak Kastam memerlukan bantuan anjing pengesan untuk mengesan dadah yang disorok di dalam beg tersebut. Pegawai Kastam juga menemui dadah tersebut dengan menggunakan pisau untuk memotong ruangan di bahagian sulit bawah beg. Berdasarkan kepada fakta-fakta ini, inferens yang munasabah boleh dibuat bahawa tertuduh mempunyai pengetahuan ke atas dadah tersebut. Apatah lagi dalam beg tersebut terdapat dua helai pakaian baru dan tertuduh sendiri membuka beg tersebut.

Saya mendapati tindak-tanduk tertuduh yang nampak pucat, risau dan gelisah semasa di kawan aerotrain, pada ketika pengecaman beg dan selepas penemuan dadah adalah relevan untuk menunjukkan pengetahuan tertuduh. Sila rujuk kes *Parlan Dadeh v Public Prosecutor* [2008] 6 MLJ [m/s 19]. Keadaan tertuduh kelihatan cemas gelisah dan pucat langsung tidak dipertikaikan semasa SP3 memberi keterangan.

[12] From the above analysis, it is clear that the appellant had given two conflicting versions as to how the bag containing the drugs got into his possession. At the prosecution stage, defence had suggested that Tiang was the one who handed the said bag to him. However, at the defence stage, the appellant changed his line of defence, where said it was Phang who asked him to carry the said bag to Malaysia. These conflicting versions make his defence very doubtful or a recent invention by him.

[13] It is very clear that the learned trial judge also rejected the appellant's defence of being an innocent carrier, for the reasons stated above.

[14] The appellant also failed to explain why he waited until his defence was called to reveal the crucial evidence to his defence, that the said bag belonged to Phang and Phang asked him to carry it to Malaysia. This is not a conduct of an innocent person.

[15] On this same issue, the Federal Court in the case of *Teng Howe Seng v Public Prosecutor* [2009] 3 MLJ 46, had made the following observation:

> [30] With regard to the above contention of the appellant it is our judgment that it is misconceived. By commenting on the failure of the appellant to provide all relevant information regarding 'Ho Seng' to the police at the time of his arrest or when his cautioned statement (D2) was recorded five days after his arrest does not mean that the learned tiral judge had imposed on the appellant a duty to speak/disclose them in his cautioned statement nor did he draw any adverse inference against the appellant. The learned trial judge's comments on the late disclosure of the real identity of 'Ho Seng' at the defence stage merely goes to show the weight that the court attached to the appellant's defence which is permitted by the law. On this point we would like to refer to the case of *Public Prosecutor v Badrulsham bin Baharom* [1988] 2 MLJ 585, wherein Lim Beng Choon J at p 591 said that:
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> > ... So we are left with nothing more that the bare oral assertion of the accused that it was Noor Azlan who asked him to collect the bag on behalf of the former and that the accused himself had no knowledge of the contents of P3. If that be the case, one would hardly imagine that he would not have told either PW3 or PW5 at the Railway Station at Alor Setar at the time of his arrest that P3 belonged to Noor Azlan instead of saying that there was nothing in P3.
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> [31] In *Badrulsham*'s case, the court was of the view that the failure of the accused to inform the raiding officers that the white plastic bag belonged to Noor Azlan at the time of his arrest and only revealing this information during the interrogation two hours after his arrest, goes some way to support the case for the prosecution.
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> [32] Applying the principle in *Badrulsham*'s case to the facts of the instant case, the learned trial judge was correct to conclude that the appellant had two opportunities to provide information about 'Ho Seng', ie at the time of his arrest and five days later during recording of his cautioned statement but he failed to do so. We are therefore of the view that in the circumstances, the appellant's failure to provide relevant information about a 'Ho Seng' for the police to carry out a thorough investigation into the probability of his defence, entitled the learned trial judge to disbelieve him.

[16] The submission of learned counsel that the failure of the prosecution to call Phang to rebut the appellant's version or to offer Phang and Tiang to the defence is fatal, is without merit. The late disclosure of the names and roles of Phang and Tiang until his defence was called, make it too late for the police to check the veracity of the appellant's version of the facts and to produce these witnesses. In *Alcontara a/l Ambross Anthony* [1996] 1 MLJ 209; [1966] 1 CLJ 705, the Federal Court held that (at p 216 (MLJ); at p 716 (CLJ)):

> It is clear law that judge must tread warily when commenting on the fact that an accused has chosen to conceal the lines of his defence until the trial, rather than disclosing them at or about the time of his arrest during police interrogation. He may observe that such a stance would make it difficult for the police to check the veracity of the accused's version of the facts and so detracts from the weight to be

accorded to it (see *R v Littleboy* [1934] 2 KB 408: *R v Ryan* [1966] 50 Cr App R 144).

CONCLUSION

[17] For the reasons stated above, we unanimously agree with the decision of the learned trial judge. We affirmed the conviction and sentence. The appeal is dismissed.

Appeal dismissed, conviction and sentence affirmed.

Reported by Ashgar Ali Ali Mohamad